Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Requirements Applicable to Video	)	MB Docket No. 05-171
News Releases	)	
	)	
	)	

COMMENTS OF PR NEWSWIRE ASSOCIATION LLC AND MULTIVU, INC., A PR NEWSWIRE COMPANY

Ken Dowell
Executive Vice President, Information Services
PR Newswire Association LLC
810 Seventh Avenue, 35th Floor
New York, New York 10019
(212) 596-1500

Robert Corn-Revere
Davis Wright Tremaine L.L.P.
1500 K Street, N.W., Suite 450
Washington, D.C. 20005-1272
(202) 508-6600
Counsel

June 22, 2005

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Nearly 40 years ago, the FCC recognized that "no government agency can authenticate news, or should try to do so." Yet its Public Notice on video news releases ("VNRs") outlines an expansive and unprecedented legal regime that invites the FCC and its complaint processes into newsrooms across America in a way that would intrude upon the editorial judgment of broadcast journalists. The Notice's claim that FCC sponsorship identification rules impose a greater obligation of disclosure for controversial issue and political programming significantly expands FCC authority over news. Read literally, it could be interpreted to mean newscasters must include sponsorship IDs whenever they incorporate VNR material into a story involving a "controversial" issue. This interpretation is unwarranted under the FCC's longstanding construction of the law. It would revive part of the long-defunct "fairness doctrine" and place unworkable burdens on broadcast journalists, and thus would violate the First Amendment.

VNRs are merely an evolution of traditional print press releases that have been formatted for the medium of television. Such releases are common in newsrooms, and journalists make decisions based on editorial judgment on whether the information is newsworthy and, if so, what part to use. Studies of VNR usage confirm that television stations often do not use VNR footage in its entirety, but regardless of how much or how little they use, they subject the material to their usual editorial processes.

The current controversy arose from the undisclosed use of press materials by federal agencies, leading to reactions by Congress, the FCC, and professional press organizations. Congress focused on clarifying and strengthening federal restrictions on the use of "propaganda" by federal agencies, while journalistic organizations articulated ethical guidelines for the use of VNRs. For its part, the FCC issued the Public Notice to "remind" broadcasters, cable operators

and others of their sponsorship identification obligations under the Communications Act. However, since the VNR controversy involves various issues that include the control of government speech, the application of journalistic standards, and the appropriate role for broadcast regulation, the Public Notice risks extending FCC rules too far. The Public Notice is problematic because it intermingles the possible impropriety of non-disclosure of governmental news releases with "payola" issues and matters of journalistic ethics.

Using the FCC's sponsorship identification rules to require disclosure of the use of "controversial" material from VNRs would improperly involve government in journalistic decision-making. The statement in the Public Notice that broadcasters and cable operators must disclose the nature, source and sponsorship of such programming under 47 U.S.C. § 317 expands the law in a manner inconsistent with the language, origin, and history of that provision. Section 317 historically has been interpreted narrowly to preclude interference with licensee judgments, and has never been applied to newscasts in the manner now suggested in the Public Notice. The Commission's current references to the Section 317(a)(2) requirements applicable to "political programming" and "controversial issues" would revive fairness doctrine precepts that the FCC eliminated for sound policy and constitutional reasons.

Such a regulatory approach is ill-suited to addressing the issues raised by VNRs. The term of art "controversial issue of public importance," which is coextensive with Section 317's "controversial issue" language, has never been applied to all news stories. The terms are not self-defining, and have proven to be elusive concepts that courts described as "measuring the immeasurable." If the FCC now tried to define which news stories that incorporate VNR material require some type of disclosure, it would be engulfed in a legal morass comparable to the one it faced when it attempted to apply the fairness doctrine to some product commercials but

not others. After five years, the Commission abandoned that regulatory experiment as an utter failure. In the same way, trying to separate news stories that include "controversial issues" from others would not be simple and would subject all newscasts that contain VNR material to governmental scrutiny.

The broad interpretation articulated in the Public Notice also overlooks the FCC's statutory discretion in this area. Section 317(a)(2) merely allows the FCC to require sponsorship IDs for certain political or controversial issue materials, it does not require such announcements. Since the scope of controversial issues is quite narrow, and disclosures relating to political advertisements are regulated elsewhere, the First Amendment protection afforded broadcasting requires that the FCC interpret its authority very narrowly. Such abstention comports with FCC and judicial analyses in this area, and arguably is constitutionally compelled, especially given the chilling effect on news dissemination that constant consideration of regulatory implications of VNR use would have on broadcasters.

Any new sponsorship identification requirement for VNRs similarly would raise significant First Amendment questions. Such disclosure requirements are content-based and courts are increasingly hesitant to allow such regulation of broadcasting in the absence of a specific statutory mandate. This and other changes reflect evolution of the law since the FCC first adopted the fairness doctrine and the related sponsorship identification rules. The fairness doctrine was upheld under a scarcity rationale that this Commission has repeatedly questioned. Indeed, the FCC previously eliminated the fairness doctrine and concluded that assertions of spectrum scarcity could not justify such rules as necessary to serve the public interest.

Finally, Section 317 does not apply to cable television programming. Congress never amended Section 317 to apply to cable television, and its extension to cable is purely an FCC

construction. Applying basic principles of statutory construction to this provision bars the application of Section 317 to cable television. Moreover, even if the FCC had Section 317 jurisdiction over cable, it would apply only to cable origination programming, and not cable networks such as CNN, MSNBC, or FOX News. There also are substantial constitutional impediments to applying Section 317 to cable. The FCC never has had constitutional authority to regulate cable and satellite content as it does broadcasting.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Requirements Applicable to Video News Releases	)	MB Docket No. 05-171
	)	
	)	
	)	

COMMENTS OF PR NEWSWIRE ASSOCIATION LLC
AND MULTIVU, INC., A PR NEWSWIRE COMPANY

PR Newswire Association LLC ("PR Newswire") and MultiVu, Inc., a PR Newswire Company ("MultiVu"), hereby respond to the Commission's April 13, 2005, Public Notice on the application of FCC sponsorship identification rules to video news releases ("VNRs").[1] Although the FCC's inquiry was prompted by well-publicized and legitimate concerns about the practices of some federal government agencies involving VNRs, the Public Notice more broadly seeks comment on all uses of video releases and "reminds" broadcasters and cable operators, as well as "all entities and individuals involved in the production and provision of the material at issue … of their respective disclosure responsibilities under the Commission's sponsorship identification rules."[2]

PR Newswire's comments focus on an important aspect of the Public Notice that was *not* a major impetus for its release (undisclosed government agency releases) *nor* the principal

[1] *Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators*, 20 FCC Rcd 8593 (2005) ("Public Notice").

[2] *Id*. at 1 & n.1. *See also e.g*., Letter from Josh Silver, Executive Director, Free Press, to Chairman Kevin Martin, FCC, March 21, 2005 (citing petition urging FCC to investigate broadcasters "who distribute government-sponsored news reports without properly identifying their source"); Letter from Senator John Kerry to Chairman Michael Powell, March 15, 2005; Letter from Senator Daniel Inouye to Chairman Michael Powell, March 14, 2005.

rationale for FCC sponsorship identification rules (paid broadcasts), but which poses a significant regulatory issue. Specifically, we address an issue that the Public Notice discussed only in passing, but has major ramifications for broadcast journalism – the supposed disclosure requirement for use of material in VNRs that cover controversial issues of public importance even when no compensation is paid for its broadcast. [3]

The Public Notice states that the "sponsorship identification rules impose upon broadcast licensees and cable operators a greater obligation of disclosure in connection with political material and program matter dealing with controversial issues." Public Notice at 4. This statement of the rules represents a significant expansion of FCC authority over news programming. Read literally, the Public Notice could be interpreted to mean broadcasters would have an affirmative obligation to include sponsorship identification whenever they incorporate *any* material from a VNR into a news story that deals with controversial issues. As explained below, such an interpretation of the law should be rejected because it would revive part of the long-defunct "fairness doctrine" and would impose an unworkable burden on broadcast journalists. Such an expansive and unprecedented reading of the law invites the FCC and its administrative complaint process into newsrooms across America in a way that would intrude deeply into the editorial judgment of broadcast journalists. Additionally, the Public Notice overstates the FCC's authority to regulate programming on cable networks.

[3] The analysis herein is structured around the applicability of 47 U.S.C. § 317, and the FCC rules implementing it, to the use of VNRs by broadcasters and cable operators. We note that the Public Notice also raises issues arising under 47 U.S.C. § 508, a corollary provision that erects a disclosure regime for broadcasters, their employees, and outside sources with respect to transfers of consideration for airing program matter. The discussion of Section 317 herein is intended to include by reference, to the extent appropriate, the ancillary obligations imposed by Section 508.

I. BACKGROUND

PR Newswire was established in 1954 and is a leading provider worldwide of news distribution services for approximately 40,000 corporate, labor, association, non-profit, government and other clients that use PR Newswire's services to reach various critical audiences, including the news media, the investment community, government decision-makers, and the general public, with accurate and timely news resources. [4] PR Newswire employs all available media to distribute news items including wire, Internet, satellite, email, fax, and wireless platforms. Its products include text news releases as well as electronic versions, such as audio and video news releases. One of PR Newswire's leading brands, MultiVu, is a leader in public relations and dissemination of broadcast information. PR Newswire and MultiVu do not pay broadcast news organizations to run any particular news item (nor do PR Newswire's other services, which do not operate in this area). Moreover, all press materials that PR Newswire provides to media organizations are prominently labeled to identify the source of the information, and all VNRs include an on-screen identification. [5]

A. Press Releases and Video News Releases

Press releases have been an established part of the journalistic landscape for nearly a century. It is widely believed the press release was invented in 1906 when the Pennsylvania Railroad distributed releases to journalists after a major rail accident. The railroad issued its account of what had happened, invited reporters and photographers to the scene, and provided a

[4] PR Newswire operates a number of other services in addition to MultiVu that, while not involved in the production and dissemination of VNRs, are leading brands in their industry sectors, including ProfNet, eWatch, NewsPrompt, MEDIAtlas, Search Engine Visibility, and MediaRoom. PR Newswire is a subsidiary of United Business Media plc of London.

[5] Each video includes a statement in the "slate" that reads "video provided by" the MultiVu client or sponsoring organization with which the video originates. MultiVu is referenced in the countdown and title slate at the beginning of the video.

special train to get them there. In the weeks that followed, newspapers and elected officials effusively praised the railroad for its openness and apparent concern for the safety of its passengers. [6] Later the same year, some anthracite coal operators were criticized for their use of press releases during a strike. Although some criticized the press release as an attempt to manipulate the news, the episode did not lead to government regulation of journalistic practices but instead prompted the public relations agency to adopt a "Declaration of Principles." [7]

Today, press releases of all kinds, also called news releases, are commonplace in newsrooms serving audiences in all media. Those with a story to tell and information to convey routinely send their information to news outlets, where editors and journalists make decisions about whether the information is newsworthy, and, if so, what part or parts of the release to use. Often, the news release provides the initial idea to do a story, and reporters are then assigned to begin a piece from scratch, while other times parts of the release will be incorporated into the final account. The choice of whether to use all or part of a news release is purely a function of a news organization's editorial judgment. Those who produce news releases try to anticipate what stories will interest news gatekeepers, but in the end it is the editors and news directors who must consider the information, evaluate it in light of the needs and policies of their particular medium and the presumed interests of their audience. As one public relations textbook explained, "it all boils down to this:"

---

[6] PR Web, http://searchenginepromotion.prweb.com/codeofethics.php (visited June 9, 2005).

[7] *Id*. The Declaration stated: "This is not a secret press bureau. All our work is done in the open. We aim to supply news. This is not an advertising agency; if you think any of our matter ought properly to go to your business office, do not use it. Our matter is accurate. Further details on any subject treated will be supplied promptly, and any editor will be assisted most cheerfully in verifying directly any statement of fact. In brief, our plan is, frankly and openly, on behalf of business concerns and public institutions, to supply to the press and public of the United States prompt and accurate information concerning subjects which it is of value and interest to the public to know about."

> News is what the editor or news director says is news. The media call the shots. It doesn't matter if you and your boss or client thinks the information is important. If the media gatekeeper doesn't think it's news, it's not news. No appeals process. [8]

Video news releases are merely updated versions of traditional press releases distributed to print journalists. A VNR often conveys the same information as a press release, but in a format readily usable by television stations. VNRs usually contain several elements, including a series of video clips, or "B-roll footage," interviews on tape or "soundbites," title cards, and a news story. [9] VNRs have been used increasingly during approximately the past 15 years, [10] and it is now common for private corporations, nonprofit organizations, and government entities to distribute VNRs to U.S. and international broadcasters. [11]

VNRs can help journalists discover newsworthy stories and provide information they need to report a story to their audience. As Radio-Television News Directors Association President Barbara Cochran recently testified, footage from VNRs can "provide useful material that the news organization could not have obtained on its own." Just as with a traditional press release,

---

[8] Ronald G. Smith, NEWS AND THE PUBIC RELATIONS WRITER 96 (Lawrence Ealbaum Assocs. 2003).

[9] *See* Testimony of Susan A. Poling, Managing Associate General Counsel, Office of General Counsel, Before the Committee on Commerce, Science, and Transportation, May 12, 2005.

[10] In 1991 it was reported that 78 percent of news directors responding to a survey reported using edited VNRs at least once a week in their newscasts, while some estimates place the figure even higher. *Compare* Bob Soneclar, *The VNR Top Ten: How Much Video PR Gets on the Evening News?*, COLUMBIA JOURNALISM REVIEW, March 1, 1991 at 14, *with* Anne R. Owen and James A. Karrh, *Video News Releases: Effects on Viewer Recall and Attitudes*, 22 PUBLIC RELATIONS REVIEW 369 (Winter 1996) (reporting that 100 percent of stations polled acknowledged use of some VNR material in newscasts in 1992). In 2001, it was reported that approximately 800 television stations in the U.S. use VNRs. Mark D. Harmon and Candace White, *How Television News Programs Use Video News Releases*, 27 PUBLIC RELATIONS REVIEW 213 (June 22, 2001).

[11] *See, e.g.*, Poling Testimony, *supra* note 9.

independent editorial judgment determines how these materials are used. Thus, VNRs are not a "take it or leave it" proposition – most journalists use only portions of VNRs for their stories, such as interviews with experts or video footage to which the journalist otherwise might lack access.[12] Studies of VNR use indicate that most news organizations that use VNR materials often have used only a portion or edited versions of the materials provided.[13] Because journalists exercise editorial control over how this material is used, they may use the video to support a story angle that is either unrelated to or even in opposition to the intended messaging.

Accordingly, VNRs are subject to the same journalistic constraints and judgments as any traditional press release. News organizations exercise independent judgment and decide what parts, if any, of a VNR to include in a given story. RTNDA's Barbara Cochran explained that "the news director or a news staff member who has been assigned that responsibility must determine the newsworthiness of the material, and he or she must judge whether and how to use the material."[14] The same journalistic judgment determines how the source of the material should be characterized in a newscast.

---

[12] *See, e.g.*, Testimony of Barbara Cochran, President, Radio-Television News Directors Association, Before the Committee on Commerce, Science, and Transp., May 12, 2005.

[13] *E.g.*, Glen T. Cameron and David Blount, *VNRs and Air Checks: A Content Analysis of the Use of Video News Releases in Television Newscasts*, 73 JOURNALISM AND MASS COMMUNICATIONS QUARTERLY 890, 893 (Winter 1996) (Study found that most news stations, regardless of market size, do not use "prepackaged" news stories on a wide-scale basis. Very few stations use VNRs without alteration.).

[14] *See, e.g.*, Cochran Testimony, *supra* note 12.

B. The Current Controversy Over Video News Releases

The current controversy over the use of VNRs began with revelations about the use of press materials by government agencies. [15] Both the Office of National Drug Control Policy and the Department of Health and Human Services' Centers for Medicare & Medicaid Services produced widely distributed VNRs that did not identify the agencies as the source of the information. [16] A similar controversy did not involve VNRs, but focused on several instances in which executive branch agencies hired commentators to promote various government programs. [17] The Government Accountability Office ("GAO") investigated the undisclosed use of VNRs by government agencies at the request of members of Congress and found such uses of VNRs violated existing restrictions on use of appropriated funds for purposes of "publicity or propaganda." [18]

---

[15] *See* Public Notice at 2 (special disclaimer regarding scope of Public Notice referencing "recent controversy over when or whether the government is permitted to sponsor VNRs").

[16] Ceci Connolly, *Drug Control Office Faulted for Issuing Fake News Tapes,* WASH. POST, Jan. 7, 2005, at A7 (VNR was distributed to 770 local news stations, and 300 news shows or more aired at least portions of the materials without identifying their source); Christopher Lee, *Law Cautions Against Outside PR Spending – Sort Of,* WASH. POST, Jan. 31, 2005, at A19.

[17] Howard Kurtz, *Administration Paid Commentator; Education Dept. Used Williams to Promote 'No Child' Law*, WASH. POST, Jan. 8, 2005, at A01 (Commentator Armstrong Williams was paid $240,000 by Department of Education to promote the No Child Left Behind Act.); Howard Kurtz, *Writer Backing Bush Plan Had Gotten Federal Contract*, WASH. POST, Jan. 26, 2005, at C1 (Department of Heath and Human Services paid columnist Maggie Gallagher to write brochures on the benefits of marriage, ghost-write an essay for an HHS executive, and produce a presentation on the benefits of marriage, and she also promoted the Administration's marriage initiative in newspaper columns without disclosing existence of her HHS contract); Christopher Lee, *USDA Paid Freelance Writer $7,500 For Articles*, WASH. POST, May 11, 2005, at A15 (Agriculture Department paid freelance writer Dave Smith at least $7,500 to write articles touting federal conservation programs and place them in magazines).

[18] *See Office of National Drug Control Policy – Video News Release*, B-303495, Jan. 4, 2005; *Department of Health and Human Services, Centers for Medicare & Medical Services – Video News Release*, B-302710, May 19, 2004 ("HHS GAO Ruling").

Annual appropriations laws governing federal agencies routinely include a standard "publicity and propaganda" clause which disallows use of funds for such purposes within the United States. [19] For example, the 2003 appropriations language that applied to HHS provided:

> No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress. [20]

Federal law also prohibits use of appropriated funds to hire publicity experts. [21] Based on such provisions, the GAO issued a memorandum to executive branch agencies in February 2005 regarding the government use of VNRs which warned agencies that government-sponsored TV "news" reports are propaganda, unless the source is apparent to viewers. [22] The GAO Memorandum cautioned that

> While agencies generally have the right to disseminate information about their policies and activities, agencies may not use appropriated funds to produce or distribute prepackaged news stories intended to be viewed by television audiences that conceal or do not clearly identify for the television viewing audience that the agency was the source of those materials. It is not enough that the contents of an agency's communication may be unobjectionable. Neither is it enough for an agency to identify itself to the broadcasting organization as the source of the prepackaged news story. [23]

However, the government's response to the use of VNRs by federal agencies was not uniform. In March 2005, the Office of Management and Budget issued a memorandum stating

---

[19] *See, e.g.,* Kevin R. Kosar, *Public Relations and Propaganda: Restrictions on Executive Agency Activities*, Congressional Research Service, Mar. 21, 2005.

[20] Pub. L. No. 108-7, Div. J., Tit. VI, § 626, 117 Stat. 11, 470 (2003). *See* HHS GAO Ruling, *supra*, at 10.

[21] *See* 5 U.S.C. § 3107.

[22] Memorandum for Heads of Departments, Agencies, and Others Concerned, from David M. Walker, Comptroller General, *Re: Prepackaged News Stories*, B-304272, Feb. 17, 2005 ("GAO Memorandum").

[23] *Id*. at 2.

that executive branch agencies need not follow GAO's interpretations of appropriations law. [24] The OMB Memorandum referred to an analysis by the Department of Justice's Office of Legal Counsel ("OLC") which concluded that "Executive Branch agencies are not bound by GAO's legal advice" and reiterated OLC's position that "the prohibition on using funds for 'propaganda' did not extend to VNRs that did not constitute advocacy for any particular position or view." [25]

C. Responses to the Video News Release Controversy

There have been various responses to the current controversies regarding the use of VNRs: Congress acted to clarify its intent with respect to the use of VNRs by federal agencies the Commission issued the instant Public Notice to remind broadcasters of their obligations under the sponsorship identification rules; and journalistic organizations have taken steps to articulate their professional standards.

1. Legislative Responses to Government VNRs

The legislative response has focused entirely on VNR use by government agencies. In May, Congress passed the Byrd Amendment to the emergency appropriations bill for the Iraq war to require disclosure of government-sponsored VNRs. The amendment, which has already taken effect, provides that "[u]nless otherwise authorized by existing law, none of the funds provided in this act or any other act may be used by a federal agency to produce any prepackaged news story unless the story includes a clear notification within the text or audio of the pre-packaged news story that the prepackaged news story was prepared or funded by that federal

[24] Joshua Bolton, Director, Office of Management and Budget, Memorandum for Heads of Departments and Agencies, *Use of Government Funds for Video News Releases*, M-05-10, Mar. 11, 2005 ("OMB Memorandum").

[25] Memorandum for the General Counsels of the Executive Branch, *Re: Whether Appropriations May be Used for Informational Video News Releases*, Mar. 1, 2005.

agency." [26] The Byrd Amendment does not impose any requirements on broadcasters or cable providers and expires at the end of the fiscal year, on September 30, 2005.

Another legislative measure would be more permanent. The Truth in Broadcasting Act of 2005, S. 967, was introduced in the Senate April 28, 2005, by Senators Lautenberg (D.-N.J.) and Kerry (D.-Mass). Its stated purpose is to "amend the Communications Act of 1934 to ensure that prepackaged news stories contain announcements that inform viewers that the information within was provided by the United States Government, and for other purposes." The bill would amend Section 342 of the Communications Act to require that a disclaimer "that conspicuously identifies the United States Government as the source for the prepackaged news story" for "[a]ny prepackaged news story produced by or on behalf of a Federal agency that is broadcast or distributed by a network organization, broadcast licensee or permittee, or multichannel video programming distributor in the United States." [27] Hearings on the bill were held before the Committee on Commerce, Science and Transportation on May 12, 2005. [28]

---

[26] Pub. L. No. 109-13, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, § 6076 (signed by President Bush on May 11, 2005).

[27] The announcement must include a "conspicuous display of the statement 'PRODUCED BY THE U.S. GOVERNMENT'" on TV programs, and it would be unlawful to remove any announcement required by the bill. Accordingly, S. 967 would impose an additional requirement on broadcasters and cablecasters not imposed by the Byrd Amendment.

[28] Two other bills would clarify restrictions on using appropriated funds for "publicity and propaganda." On January 26, 2005, H.R. 373 was introduced in the House of Representatives. It would require a federal agency to notify Congress within 30 days after entering into a public relations contract, codify the publicity and propaganda clause, and require agencies to label their communications as having been paid for with appropriated funds. On February 2, 2005, S. 266 was introduced in the Senate. It would define "publicity and propaganda," codify the types of communications that constitute publicity and propaganda, provide for financial penalties for officials who authorize use of appropriated funds for publicity and propaganda, and provide "whistleblower" protection for agency employees. Both bills have been referred to committee.

2. FCC Sponsorship Identification Rules

The instant Public Notice was issued April 13 in response to requests from legislators and the public that the FCC consider whether certain uses of VNRs comply with the sponsorship identification requirements of the Communications Act. The Commission reminded broadcasters, cable operators and others of their sponsorship identification obligations with respect to VNRs and sought public comment on the issue. Public Notice at 1. Although the issues raised in this proceeding differ from those addressed by the legislation, Commissioner Jonathan Adelstein pointed to a common thread in his May 12 testimony on S. 967. He testified that the hearing "is especially timely because, until recently, there appeared to be a surprising lack of awareness that the Communications Act and FCC rules already require disclosure by broadcasters and cable companies of who is behind certain paid material or political or controversial issue programming." [29] He added that "Congress generally excluded property or services provided to broadcasters free or at nominal charge from the scope of consideration that triggers the disclosure requirement – except for controversial issue or political programming." [30]

Commissioner Adelstein described S. 967 as "an effective complement to our existing sponsorship identification rules." [31] His statement acknowledges that the issues currently being explored by the Commission are far broader than just the government's use of VNRs as governed by the Byrd Amendment and addressed by pending legislation. The issues of whether, and how, VNR material should be disclosed when it appears in newscasts are separate from the

[29] Statement of Jonathan S. Adelstein, Commissioner, Federal Communications Commission, Before the Committee on Commerce, Science, and Transp., May 12, 2005.

[30] *Id.*

[31] *Id.*

issue of "government propaganda" and touch on questions of judgment typically performed by editors in newsrooms.

3. Journalistic Standards

In addition to governmental responses, the VNR controversies also prompted a journalistic review of ethical practices not unlike the reaction to early press releases in the first years of the Twentieth Century. For example, in April 2005, the Radio-Television News Directors Association & Foundation issued guidelines for journalists to consider "when making decisions to broadcast video or audio produced and/or supplied by non-editorial sources." [32] These guidelines state that:

- News managers and producers should determine if the station is able to shoot this video or capture this audio itself, or get it through regular editorial channels, such as its network feed service. If this video/audio is available in no other way but through corporate release (as in the case of proprietary assembly line video), then managers should decide what value using the video/audio brings to the newscast, and if that value outweighs the possible appearance of "product placement" or commercial interests.

- News managers and producers should clearly disclose the origin of information and label all material provided by corporate or other non-editorial sources.

- News managers and producers should determine if interviews provided with video/audio releases follow the same standards regarding conflicts of interest as used in the newsroom.

- Before re-voicing and airing stories released with all their elements and intended for that purpose, managers and producers should ask questions regarding whether the editorial process behind the story is in concert with those used in the newsroom.

- Producers should question the source of network feed video that appears to have come from sources other than the network's news operation.

[32] RTNDA Guidelines for Use of Non-Editorial Video and Audio, *available at* http://www.rtnda.org/foi/finalvnr.html (viewed June 1, 2005).

- News managers and producers should consider how video/audio released from groups without a profit or political agenda, such as nonprofit, charitable and educational institutions, will be used in newscasts, if at all.

The Society of Professional Journalists' Code of Ethics also urges journalists to "[d]istinguish between advocacy and news reporting" and to "[d]istinguish news from advertising and shun hybrids that blur the lines between the two." [33] In addition, many individual news organizations have their own guidelines. For example, California's KSBW-TV issued the following statement regarding its policy on the use of VNRs:

> Whether or not the government should be in the business of putting out VNRs is a subject we will leave for others to debate, but we do have a strong point-of-view about the propriety of their use on local TV news. Video News Releases are no better or worse than printed press releases. Good newspapers use information provided on releases for background and then independently report on any worthy news; some poorly run newspapers take press releases and just re-print them, with no independent reporting. The same can happen with VNRs and local TV news.

The station went on to emphasize that when it utilizes a VNR it "is only used for illustrating our own independently reported story." [34]

The various responses to issues involving the use of VNRs illustrate the complexity of the issues raised by the Commission's Public Notice. The legislative response seeks to clarify how current uses of VNRs by federal agencies should be governed by well-established restrictions on governmental publicity and propaganda. The Commission's inquiry more broadly

[33] Society of Professional Journalists' Code of Ethics, *available at* www.spj.org/ethics_code.asp.

[34] KSBW Editorial: Video News Release (May 12, 2005), *available at* http://www.theksbwchannel.com/ksbw/4487682/detail.html (viewed June 1, 2005). *See also* WCCO's Video News Release Policy, *available at* http://wcco.com/vnrpolicy/ (viewed June 1, 2005) ("A newsroom manager must review and approve all use of VNR material. If any VNR material is used, there must be an on-air graphic and a verbal credit given to the source of the material.").

addresses issues of "sponsored" programming and how existing rules may relate to the uses of VNRs. At the same time, news organizations examine the use of VNRs as a question of journalistic ethics.

II. IT IS NECESSARY TO IDENTIFY THE PRECISE PROBLEM IN ORDER TO FASHION APPROPRIATE POLICIES

For the Commission to implement sound policies it is important that it not confuse issues of government speech, regulation of paid programming, and news judgment. In this regard, the Public Notice is problematic because it intermingles the possible impropriety of non-disclosure of governmental news releases with FCC "payola" issues and questions of journalistic ethics. From a policy perspective, each issue presents very different problems that call for different solutions. The Supreme Court recently reemphasized that very different standards govern government speech as distinguished from private speech.[35] In this regard, the government traditionally has restricted its own ability to engage in propaganda, while it has avoided trying to dictate journalistic standards.

A. Proposed Controls on Propaganda are Consistent with the Government's Traditional Role

It is the norm, not the exception, for Congress to impose limits on government-funded speech to preclude its use as a form of propaganda. For example, the Corporation for Public Broadcasting ("CPB") was given a mandate to facilitate the production of "programs of high quality, diversity, creativity, excellence, and innovation, … with strict adherence to objectivity and balance in all programs … of a controversial nature."[36] However, CPB may neither engage

[35] *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055 (2005) ("the Government's own speech … is exempt from First Amendment scrutiny").

[36] 47 U.S.C. § 396(g)(1)(A). The "objectivity and balance" requirement was bolstered by an amendment to the Public Telecommunication Act of 1992 that required CPB to review its programming activities, establish procedures for public input, and to submit annual reports to the

in broadcasting itself nor produce programming, and is required to remain a strictly non-political and non-profit organization.[37] Similarly, Voice of America, the multimedia international broadcast service funded by the U.S. government was created by Congress to produce pro-U.S. news reports to international audiences.[38] It has been described as the United States' "official propaganda arm,"[39] and accordingly is prohibited from broadcasting within the United States.[40] Congress was concerned that transmitting government-produced news in the U.S. would "infringe upon the traditional freedom of the press and attempt to control public opinion."[41] Consistent with these examples, legislative restrictions on the undisclosed use of VNRs are supported by typical appropriations conditions as well as limitations normally imposed on various forms of "government speech."

President and Congress regarding its efforts to ensure "objectivity and balance" in CPB-funded programming. Section 19, Public Telecommunication Act of 1992, Pub. L. 102-356.

[37] 47 U.S.C. § 396(g)(3). CPB cannot engage in programming itself, but instead created the Public Broadcasting Service and National Public Radio to distribute programming to member radio and television stations.

[38] VOA broadcasts more than 1,000 hours of news, information, educational, and cultural programming every week to an estimated worldwide audience of more than 100 million people. *See* http://www.voanews.com/english/About/index.cfm (viewed June 1, 2005).

[39] *See, e.g.*, Pamela McClintock, *Voice of America TV calls Armenia*, Variety.Com, May 3, 2004 ("VOA is the U.S. government's chief propaganda arm overseas."); Eric Boehlert, *Why the U.S. is losing the propaganda war*, Salon.com, Oct. 12, 2001 (VOA is "inherently propaganda-based"); Karen DeYoung and Walter Pincus, *U.S. to Take Its Message to Iraqi Airwaves*, WASH. POST, May 11, 2003, at A17 (describing role of VOA on the "propaganda front").

[40] 22 U.S.C. § 1461-1a.

[41] HHS GAO Ruling, *supra*, at 13.

B. FCC Oversight of News Judgment is Inconsistent with the Government's Traditional Role

In sharp contrast to questions involving government speech, it is the exception, not the norm, for Congress to intrude in matters of private editorial judgment. Even in the field of broadcasting, where government has had some greater latitude to regulate, Congress recognized that broadcasters "are engaged in a vital and independent form of communicative activity" [42] and conferred upon them "'the widest journalistic freedom consistent with their public [duties].'" [43] FCC policies "were drawn from the First Amendment itself [and] the 'public interest' standard necessarily invites reference to First Amendment principles." [44] Consequently, the Supreme Court has stressed that "the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." [45]

In keeping with this framework, the FCC's oversight of the content of broadcast news and journalistic decision-making has been extremely limited, and its concern with *how* licensees go about producing the news has become – properly – all but non-existent. For example, the D.C. Circuit explained that the "FCC's policy on rigging, staging, or distorting the news was developed in a series of cases beginning in 1969," at a time when "'media events' from protest demonstrations to 'photo opportunities'" first became "more pervasive," yet even then "were not

---

[42] *League of Women Voters of Cal. v. FCC*, 468 U.S. 364, 378 (1984).

[43] *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quoting *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973)). Section 326 of the Communications Act prohibits censorship and expressly withholds from government the power to "interfere with the right of free speech by means of radio communication." 47 U.S.C. § 326. This denies to the FCC "the power of censorship" as well as the ability to promulgate any "regulation or condition" that interferes with freedom of speech.

[44] *CBS v. DNC*, 412 U.S. at 121.

[45] *League of Women Voters*, 468 U.S. at 378.

the kinds of practices that concerned the Commission." [46] The Commission "refused to investigate inaccurate embellishments concerning peripheral aspects of news reports or attempts at window dressing which concerned the *manner* of presenting the news as long as the essential facts of the news stories to which these presentational devices related were … accurate[.]" [47] Consequently, "the Commission's practice in this respect has given its policy … an extremely limited scope." [48] Indeed, unless a licensee "has consistently or unreasonably … falsified, distorted or suppressed news," the FCC "will not interfere with a licensee's news judgments." [49]

This approach is not just sound policy – it is constitutionally mandated that "licensees are afforded broad discretion in the scheduling, selection and presentation of programs." [50] This is particularly the case with "journalistic or editorial discretion in the presentation of news" that forms "the core concept of the First Amendment's Free Press guarantee" and requires that "licensees are entitled to the widest latitude of journalistic discretion." [51] Such discretion necessarily includes decisions about whether to use VNRs, the manner in which they are used, the portions of them that make their way into what ultimately is broadcast, and whether the licensee wishes to adopt the VNR (or portions or it) as commensurate with its own editorial

---

[46] *Galloway v. FCC*, 778 F.2d 16, 20 (D.C. Cir. 1985) (citing *Hunger In America*, 20 F.C.C.2d 143 (1969); *WBBM-TV*, 18 F.C.C.2d 124 (1969); *Democratic Nat'l Conv. Television Coverage*, 16 F.C.C.2d 650 (1969); *Hon. Harley O. Staggers*, 25 R.R.2d (P&F) 413 (1972)).

[47] *Id*. (emphasis in original, internal quotation and citations omitted).

[48] *Id*. at 20-21.

[49] *Field Communications Corp.*, 68 F.C.C.2d 817, 819 (1978).

[50] *Dr. Paul Klite*, 12 C.R. (P&F) 79, 81 (MMB 1998) ("Section 326 … and the First Amendment … prohibit any Commission actions which would improperly interfere with the programming decisions of licensees.").

[51] *Id*.

viewpoint or to disclose its separate origin.[52] As the Commission has held, "in this democracy, no government agency can authenticate news, or should try to do so."[53]

III. INTERPRETING THE FCC SPONSORSHIP IDENTIFICATION RULES TO REQUIRE DISCLOSURE OF VNR USES IN NEWSCASTS WOULD INTRUDE DEEPLY INTO THE EDITORIAL PROCESS

Using FCC rules to police the use of press releases in newscasts would inappropriately involve the government in journalistic decision-making. The admonition in the Public Notice that "whenever broadcast stations and cable operators air VNRs [they] generally must clearly disclose … the nature, source and sponsorship of the material" vastly expands Section 317 in a manner that is inconsistent with the statutory language and its origins, and at odds with recent history of how the provision applies. Public Notice at 2. The Public Notice's invocation of the reference in Section 317(a)(2) to "political programming" and "controversial issues" also improperly seeks to reinvigorate now-defunct fairness doctrine principles that were eliminated for sound policy and constitutional reasons. *Id*. at 4.

A. The FCC's Public Notice Adopted an Overly Expansive Reading of the Section 317 Sponsorship ID Requirements

The assertion that sponsorship identification requirements may apply "whenever" television outlets incorporate VNRs into their news programming is inconsistent with the text of Section 317, congressional intent, and Commission decisions applying the law. The FCC has made clear over the years that the law must be interpreted narrowly, and that Section 317 and its

[52] Even where licensees run what the Commission may believe is "pseudo-news coverage of its sponsors' business activities" or "adjusted or distorted … coverage for purely commercial" reasons, it has emphasized that it "does not attempt to direct broadcasters in the selection of specific programming." *Tri-State Broad. Co.*, 59 F.C.C.2d 1240, 1244 (1976).

[53] *Galloway*, 778 F.2d at 20 (quoting *Hunger in America*, 20 F.C.C.2d at 151).

implementing rules require sponsorship IDs only in very specific instances. [54] The Commission has observed that "from the language of Section 317 it appears that Congress intended to limit this requirement to certain well-defined program types." [55] Specifically, it has held that "an expansive interpretation … that applies … to discounted programming … would be a novel interpretation" that "would significantly broaden the type of situations in which a sponsorship identification would be required, with no indication whatever that Congress intended such a result." [56] Moreover, as explained below, an even narrower scope applies in interpreting Section 317(a)(2), which involves political programming and controversial issues.

1. Section 317's Sponsorship ID Requirements Do Not Apply to News

Section 317 has been applied almost exclusively to cases where broadcasters received some type of consideration to run an advertisement or announcement in programming breaks, or to include a product or service, or mention of it, in a program. The relatively few remaining cases primarily involve instances where licensees received independent, discrete, stand-alone programming from an outside source and broadcast it over their stations, and do not involve circumstances analogous to VNRs that television programmers either use or discard at their option, and in whatever proportion meets their journalistic needs.

In cases having perhaps the most direct relevance to the types of VNRs that led the FCC to initiate this proceeding, the Commission held that Section 317 requires sponsorship

---

[54] *See* 47 U.S.C. § 317(a)(1)-(2); 47 C.F.R. §§ 73.1212(a), (d), 76.1615(a), (c). *See also* Richard Kielbowicz and Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J., 329, 359 (March 2004) ("*Unmasking Hidden Commercials*").

[55] *Barry G. Silverman*, 63 F.C.C.2d 507, 512 (1977).

[56] *Complaint of National Ass'n for Better Broad.*, 4 FCC Rcd 4988, 4989 (1989) ("*NABB*").

identification when government agencies engage in paid broadcast advertising. [57] The key factor in these cases was the fact that consideration was paid. Accordingly, the Commission stressed that if the same or similar spots ran at no cost to the government, no sponsorship identification is required. [58] Other "reminders" to broadcasters about their Section 317 obligations prior to the current Public Notice, including one issued at the same time as the 1977 DOD and Postal Service cases cited above, emphasized the paid nature of the spots and the resulting sponsorship identification obligations. [59]

In the context of political messages, FCC decisions applying Section 317 relate almost exclusively to paid programs furnished by a candidate or issue advocate, and not programming developed by the broadcaster and offered as its own. [60] Even in a case analyzing a promotion presented as news, the key issue for the Commission was compensation – the fact that an advertiser paid the station to transmit discrete, stand-alone programming – as opposed to

---

[57] *A.J. Martin*, 41 R.R.2d (P&F) 881 (1977); *Thomas R. Sharbaugh*, 41 R.R.2d (P&F) 877 (1977) (holding, respectively, Department of Defense paid recruiting advertising and U.S. Postal Service advertisements for its goods and services, subject to sponsorship identification rules).

[58] *Id*. *See also Commission Reminds Broadcast Licensees and Cable Operators of Sponsorship Identification Requirements Applicable to Paid-For "Public Service" Messages*, 6 FCC Rcd 5861 (1991) ("*1991 Reminder*") ("when no payment or other valuable consideration is paid or promised … no sponsorship identification is necessary," but "[w]hen payment is made … the same announcement … violates Section 317") (footnotes omitted).

[59] *1991 Reminder*, 6 FCC Rcd at 5861 ("However obvious the source [of a paid-for PSA] may be, this information alone does not adequately convey to the public that the entity has paid … for such broadcast or cablecast."); *Application of Sponsorship Identification Rules to Political Broadcasters, Teaser Announcements, Governmental Entities and Other Organizations*, 41 R.R.2d (P&F) 761 (1977) (citing "failures" that had "arisen in connection with … commercial messages *paid for* by (i) Federal and State government entities and local public service organizations and, (ii) trade associations") (emphasis added).

[60] *E.g.*, *Leonard A. Bolton*, 5 FCC Rcd 5584 (MMB 1990) (discussing "a feature entitled Countdown" that was "in reality" paid "[political] advertising rather than programming") (edit in original).

something intermingled with the broadcaster's own news offering.[61] Similar considerations came into play when the FCC confronted claims that providing a program is itself consideration that triggers sponsorship ID obligations.[62] Where outside sources furnished broadcasters at no charge with program material they "had [no] obligation, contractual or otherwise, to broadcast," the Commission held that the sponsorship identifications were "clearly inapplicable."[63]

2. Section 317(a)(2)'s Requirements for "Political and Controversial Issue" Programming Cannot Legitimately Extend to the Routine Use of VNRs

The fact that the overwhelming focus of FCC sponsorship identification precedent, prior to the Public Notice, was on paid uses of broadcast time – not news – is not surprising given Section 317's origin and evolution. As explained in the thorough and thoughtful history of Section 317 published just as the VNR issue gained momentum, Section 317 had its genesis in Section 19 of the Radio Act of 1927.[64] This provision became Section 317 of the Communications Act of 1934, where it went unmentioned in the legislative history of the new Act, and was for all intents and purposes all but ignored until the mid-1940s.[65] One notable aspect of this evolution was that the legislative history of the 1927 Act "shows that the sponsorship

[61] *See Liability of Niagara Frontier Broad. Corp.*, 51 F.C.C.2d 525 (1975).

[62] *See NABB*, 4 FCC Rcd 4988 (program itself was not consideration given that stations "exchanged valuable broadcasting advertising time in return for the program" and "there is no claim … that Group W gave consideration … in addition to supplying the program").

[63] *See Silverman*, 63 F.C.C.2d at 509.

[64] The Radio Act required that "[a]ll matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation." *See Unmasking Hidden Commercials*, *supra* note 54 at 334 (cited in Public Notice at 4 n.9).

[65] *Id*. at 336-38.

identification provision imposed only a very limited obligation upon broadcasters: to announce that a program had been paid for or furnished to the station by a third-party and to identify that party," and the legislative history of the 1934 Act "reveals no dissatisfaction with the existing sponsorship requirement." [66]

When the Commission adopted sponsorship identification regulations later ratified into Section 317(a)(2), *see infra* at 24, it "had moved toward the policy that would become the Fairness Doctrine," [67] "an obligation whose content has been defined in a long series of FCC rulings." [68] Two important aspects of the doctrine relate to "personal attacks in the context of political controversial public issues and to political editorializing." *Id.* at 370. It is thus notable that at the same time the Commission was defining the fairness doctrine, it was promulgating its first sponsorship identification rules implementing Section 317.

This close relationship between the fairness doctrine and sponsorship identification rules was written into Section 317. The current Public Notice implicitly acknowledges this connection by citing to the 1946 Report, *Public Service Responsibility of Broadcast Licensees*. Public Notice at 4 n.9. That 1946 report addressed the public service responsibilities of licensees, paying specific attention to the issue of the "intermixture of program and advertising," [69] and it "applauded efforts to prohibit broadcast journalists from reading advertisements during … news-casts because listeners might fail to distinguish between the two types of content." [70] Accord-

[66] *Loveday v. FCC*, 707 F.2d 1443, 1451-52 (D.C. Cir. 1983).

[67] *Unmasking Hidden Commercials*, *supra* note 54, at 343.

[68] *Red Lion Broad., Inc. v. FCC*, 395 U.S. 367, 369 (1969).

[69] *Public Service Responsibility of Broadcast Licensees* at 47.

[70] *Unmasking Hidden Commercials* at 344 (citing *Public Service Responsibility of Broadcast Licensees* at 47).

ingly, when the FCC promulgated the sponsorship identification rules in 1944, it did so with the issue of hidden paid advertisements in mind.

The sponsorship identification rules that relate to controversial material, as opposed to compensation, always have been tied to the fairness doctrine. As a consequence, the standard used to judge whether there is discussion of "controversial material" that would trigger the sponsorship identification requirements of Section 317(a)(2) is the same as the standard the Commission used to determine whether a "controversial issue of public importance" existed under the fairness doctrine. [71] Although the Commission interpreted its sponsorship identification rules to apply to corporate sponsorship of public affairs programs, [72] and some very early cases involved distribution of kinescope footage, [73] there are no similar recent cases. FCC

[71] *See, e.g., Silverman*, 63 F.C.C.2d at 509 ("the standard used by the [FCC] to determine the reasonableness of a licensee's judgment regarding the controversiality of broadcast material for purposes of implementing Section 73.1212[ ] was the same as that found in the *Fairness Report*, 48 F.C.C.2d 1 (1974)").

[72] The sponsorship identification regulations adopted by the Commission in 1944 were partially in response to controversies regarding sponsorship of radio news shows. *Unmasking Hidden Commercials*, *supra* note 54, at 338-344. The 1944 regulations stemmed in part from the practice of wartime advertisers using "money-saving spot announcement rather than sponsoring entire shows." *Id.* at 343. "Responsibility for the content of the show was not as readily apparent to the audience, raising prospects that the sponsorship rule could be triggered." *Id.* This has been surpassed, of course, by modern advertising practices where multiple advertisers "sponsor" a show, and the Commission's regulations were revised to reflect that the mention of the advertiser and/or its products or services in a spot suffices as sponsorship identification. *See* 47 C.F.R. § 73.1212(f).

[73] *See, e.g., Applicability of Sponsorship Identification Rules*, 40 F.C.C. 141 (1963) (furnishing "expensive kinescope prints" of Senate committee hearing would require announcement identifying party supplying the film); *KSTP, Inc.*, 40 F.C.C. 12, 13 (1958) (identification required where National Association of Manufacturers paid for kinescopes of Senate testimony supplied to television stations).

decisions interpreting the sponsorship ID rules during the past four decades have focused on the issue of compensation, not controversy. [74]

Congress devoted little, if any, attention to Section 317 until the "payola" scandals of the late 1950s, and it ultimately amended the provision in 1960, following payola investigations. [75] At that time, Congress added subsection (a)(2), which allows – but does not require – the FCC to require an "appropriate announcement" for "any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program." [76] The legislative history pertaining to subsection (a)(2) is "sparse" but "indicated that Congress adopted it in order to ratify regulations adopted by the Commission in 1944." [77] Consistent with this background, the Commission has never interpreted Section 317(a)(2) as triggering sponsorship identification requirements where broadcast journalists incorporated into newscasts content received from third parties without the additional element of consideration. Except for the isolated 1960-era kinescope decisions, FCC sponsorship identification jurisprudence has had nothing whatsoever to do with broadcast news.

---

[74] *See, e.g., Lamar A. Newcomb*, 1 F.C.C.2d 1395 (1965); *Applications of Dena Pictures, Inc.*, 71 FCC 2d 1402 (1979); *Southern Cal. Broad. Co.*, 6 FCC Rcd 4387 (1991); *Liability of Jacor Broad.*, 12 FCC Rcd 9969 (1997); *Licenses Ltd. P'ship*, 15 FCC Rcd 19705 (2000); *Isothermal Community College*, 18 FCC Rcd 23932 (2003); *Advertising Council Request for Declaratory Ruling or Waiver Concerning Sponsorship Identification Rules*, 17 FCC Rcd 22616 (2002) ("*Ad Council Waiver Order*"). *But see Gaylord Broad. Co.*, 67 F.C.C.2d 25 (Broad. Bur. 1977) (analyzing "inducement," rather than "consideration," in case involving programming discussing issue of public importance).

[75] *Loveday*, 707 F.2d at 1452.

[76] 47 U.S.C. § 317(a)(2).

[77] *Loveday*, 707 F.2d at 1453.

The notion that government has any legitimate role in overseeing the dissemination of news has been thoroughly repudiated since those early decisions. Most notably, the FCC eliminated the fairness doctrine in 1987. [78] This was based on "an exhaustive *Fairness Report*" that "declar[ed] the doctrine obsolete and no longer in the public interest" and findings that "the fairness doctrine chilled speech on controversial subjects, and … interfered too greatly with journalistic freedom." [79] The Commission found that the doctrine imposed substantial burdens on broadcasters without countervailing benefits" and "[a]s a result … was inconsistent with both the public interest and the First Amendment." [80] More recently, the Commission (under pressure from the United States Court of Appeals for the District of Columbia Circuit) abandoned the two remaining corollaries of the fairness doctrine, the personal attack and political editorial rules. [81] The FCC previously had found these policies, like the fairness doctrine itself, "interfere with the

[78] *Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff'd*, *Syracuse Peace Council*, 867 F.2d 654 (D.C. Cir. 1989).

[79] *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 876 (D.C. Cir. 1999) ("*RTNDA*") (quoting *Fairness Report*, 102 F.C.C.2d 142, 246 (1985)) (internal quotes and edits omitted). *See also Syracuse Peace Council*, 2 FCC Rcd at 5052 (fairness doctrine's "chilling effect thwarts its intended purpose, and … results in excessive and unnecessary government intervention into the editorial processes of broadcast journalists").

[80] *RTNDA*, 184 F.3d at 876. *See also Syracuse Peace Council v. FCC*, 867 F.2d at 658 ("Commission declared that the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial government interest" and "consequently … under … *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969), and its progeny … the fairness doctrine contravenes the First Amendment"). *See also id*. at 668 ("in its discussion of the fairness doctrine as a whole the Commission relied heavily on its view that government involvement in the editorial process was offensive") (citing *Fairness Report*, 102 F.C.C.2d at 190-94; *Syracuse Peace Council*, 2 FCC Rcd at 5050-52, 5055-57).

[81] *See Radio-Television News Directors' Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000).

editorial judgment of professional journalists and entangle the government in day-to-day operations of the media." [82]

Modern FCC decisions focus on the issue of compensation under the sponsorship identification rules, and not the use of unpaid video clips or mere information. Even in cases where the material claimed to constitute a Section 317 violation may arguably involve a controversial public issue and/or where the government sponsors the material at issue, the Commission focuses on whether consideration changed hands. [83] In addition, far fewer published Section 317 cases arose after eradication of the fairness doctrine, and those that did centered on issues of the presence or absence of consideration or whether a given sponsorship identification for purchased airtime sufficiently disclosed the sponsor and the payment. [84]

This proceeding cannot legitimately be used as a backdoor opportunity to revive a portion of the fairness doctrine. The Commission issued two extensive analyses, in the form of its *Fairness Report* and its *Syracuse Peace Council* order, explaining why the fairness doctrine has no place in the modern media landscape. The validity of the facts relied upon and the conclusions reached in those decisions have been explicitly approved by the courts, and there has been no change in circumstances to warrant altering the Commission's conclusions. Quite to the contrary, there are even more "new media technologies and outlets [to] ensure[ ] dissemination

---

[82] *RTNDA*, 184 F.3d at 881.

[83] *Ad Council Waiver Order*, 17 FCC Rcd at 22621-22 ("It is not the nature of the message conveyed in broadcast material that determines whether an identification is required but rather whether or not a station receives valuable consideration for broadcasting it."); *Thomas W. Dean, Esq., Litigation Director, NORML Foundation*, 16 FCC Rcd 1421 (2000).

[84] *E.g.*, *AMFM Radio Licenses*, 15 FCC Rcd 19700 (Enf. Bur. 2000); *Dallas Media Investors Corp.*, 8 FCC Rcd 3597 (MMB 1993); *Theodore Fichtenholtz*, 7 FCC Rcd 6541 (MMB 1992); *Edward G. Atsinger III*, 7 FCC Rcd 927 (1992); *Southern Cal. Broad. Co.*, 6 FCC Rcd 4387 (1991); *Metroplex Communications, Inc.*, 5 FCC Rcd 5610, 5610-11 (1990). *See also 1991 Reminder*, 6 FCC Rcd at 5861 (reminder limited to Section 317(a)(1) obligations).

of diverse viewpoints,"[85] than there were nearly two decades ago,[86] and as shown below, intrusions into editorial discretion in the form of sponsorship identifications, similar to those associated with the fairness doctrine, continue to threaten to chill television news.

3. Application of Sponsorship ID Rules to VNRs is Not Statutorily Mandated and Would Be Redundant

The Public Notice incorrectly suggests that the Communications Act compels the FCC rule requirements regarding sponsorship identification in connection with program material that is political or deals with controversial issues. Public Notice at 4. Section 317(a)(2) only permits the Commission to impose such sponsorship ID requirements, it does not require that it do so.[87] Since the scope of "controversial issues" covered by Section 317(a)(2) is quite narrow as shown below, and disclosures relating to political advertising are sufficiently regulated elsewhere, the First Amendment protection to which broadcast news is entitled indicates that the Commission should decline to impose new disclosure requirements on the use of VNRs.

The statutory analysis that allowed the Commission to eliminate the fairness doctrine (and with it, ultimately, the personal attack and political editorial rules), applies with equal force with respect to Section 317(a)(2). In *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501 (D.C. Cir. 1986) ("*TRAC*"), the D.C. Circuit affirmed an FCC determination that "Congress never actually codified the … fairness doctrine," and that the FCC accordingly was

---

[85] *RTNDA,* 184 F.3d at 876.

[86] *Compare Syracuse Peace Council*, 867 F.2d at 661 (percentage of households receiving 9 or more over-the-air signals tripled from 21% in 1974 to 64% in 1984) *with Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755 (2005) (cable systems with 36 or more channels available to nearly 80% of households).

[87] *See* 47 U.S.C. § 317(a)(2) ("Nothing in this section shall preclude the Commission …"); *Milwaukee v. Illinois*, 451 U.S. 304, 327 (1981).

free to determine it should not apply in some areas, *id*. at 516, holding that "[w]e do not believe that language adopted in 1959 made the fairness doctrine a binding statutory obligation." [88] The *TRAC* decision, coupled with the D.C. Circuit's decision the next year reaffirming that the fairness doctrine was not statutorily compelled, [89] ultimately freed the FCC to abolish it. [90] Just as the courts have determined that the language in Section 315(a) did not codify the fairness doctrine, the FCC can – and should – determine that the language in Section 317(a)(2) does not statutorily require sponsorship IDs in connection with VNRs that may contain political material or controversial issues. [91] A decision by the FCC to abstain from intruding into broadcasters' editorial decisionmaking would not affect sponsorship requirements that apply to political programming. [92]

---

[88] *Id*. at 517.

[89] *Meredith Corp.*, 809 F.2d 863, 872-73 & n.11 (D.C. Cir. 1987). *Accord Arkansas AFL-CIO v. FCC*, 11 F.3d 1430 (8th Cir. 1993).

[90] *See Syracuse Peace Council v. FCC*, 867 F.2d at 656-57.

[91] *Compare* 47 U.S.C. § 315(a) ("[n]othing in [the law] shall be construed of relieving broadcasters … from the obligation … to afford reasonable opportunity for discussion of conflicting view on issues of public importance") *with* 47 U.S.C. § 317(a)(2) ("Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue"). *See Arkansas AFL-CIO v. FCC*, 11 F.3d at 1437.

[92] Sponsorship identification for political advertising is governed by other rules. *E.g.*, 2 U.S.C. § 441d (communications must "clearly state" who paid for a political ad and whether ad was authorized by candidate). The Federal Election Commission's regulations require that political advertisements contain disclaimers which include the identification of the person or political action committee who paid for the advertisement and whether it was authorized by the candidate. 11 C.F.R. § 110.11(b). The rules include specific requirements not only for print advertisements, but technical standards for radio and television advertisements as well (*e.g.*, a candidate's picture must take up at least 80 percent of the screen height, and visual statements must appear on screen for at least four seconds). *Id*. § 110.11(c).

B. Applying Section 317 Sponsorship ID Requirements to VNRs Would be Bad Policy

1. The Fairness Doctrine Term "Controversial Issue of Public Importance" Has Never Been Interpreted to Apply to All News Stories

Applying the fairness doctrine term "controversial issue of public importance" in the VNR context would underscore the mismatch between the concerns at the center of this proceeding and the original purposes of Section 317. The term "controversial issue of public importance" was never interpreted to apply to all news stories, but rather is a term of art that applied only in a very limited class of cases where the matter discussed was both controversial and, independently, of public import, as shown in this section.[93] Accordingly, applying it routinely to VNRs and newscasts would result in great confusion and, as explained below, would raise significant constitutional issues. The term "controversial issue of public importance" is not self-defining. Rather, it has proven to be an elusive concept that, consequently, received a narrow construction. Case law in this area erected a high hurdle for an issue to be considered both "controversial" and of "public importance." The resulting uncertainty over what programming qualified explained the telling characterization of the fairness doctrine as involving "problems of measuring the immeasurable."[94]

As a threshold matter, "whether or not any given problem is a controversial issue of public importance [was] determined [initially] by the individual licensee,"[95] and the FCC afforded

[93] *See, e.g.*, *Galloway*, 778 F.2d at 19.

[94] *Syracuse Peace Council*, 867 F.2d at 660.

[95] *Complaint by Evan H. Foreman*, 24 F.C.C.2d 303, 304 (Broad. Bur. 1969).

substantial deference to broadcasters on this point.[96] Such deference not only made the standard manageable, but was a constitutional imperative.[97] Accordingly, in attempting to determine whether something qualified as a controversial issue of public importance, the "judgment [could] be a difficult one" on which broadcasters and others "might well differ,"[98] and in some cases the same material may or may not qualify based on "intent of the broadcast."[99] There even could be a "difference of opinion as to what issues were raised" in the first instance,[100] and whether a controversial issue of public importance existed could turn on "selective evaluations."[101]

Given these vagaries, and the resulting need to accord broadcasters significant deference, the FCC "evolved a unique and narrow standard to guide" the fairness doctrine, which "applie[d] to all [its] components."[102] There is no such thing as a "per se controversial issue of public im-

---

[96] *E.g.*, *Fairness Report*, 48 F.C.C.2d at 11 ("we will continue to rely heavily on the reasonable, good faith judgments of our licensees in this area"). *See also, e.g.*, *Application by Nat'l Ass'n of Gov't Employees*, 41 F.C.C.2d 965, 966 (1973); *Complaints by Sen. Chmielewski*, 41 F.C.C.2d 201, 203 (1973).

[97] *See, e.g.*, *American Sec. Council Educ. Found. v. FCC*, 607 F.2d 438, 450-51 (1979) (not requiring particularized showing of controversial issue of public importance and deference to licensee good-faith judgments "would not only render impossible a determination of reasonable balance *Vel non*, but also would place a substantial burden on the broadcaster"); *Straus Communications, Inc. v. FCC*, 530 F.2d 1001 (D.C. Cir. 1976) (narrow standard and licensee deference were necessitated "[o]ut of sensitivity to" the "abiding First Amendment difficulties," an "appreciation of Congress' intent," and the need to give "licensee[s] … maximum editorial freedom"); *NBC v. FCC*, 516 F.2d 1101, 1115 (D.C. Cir. 1974) ("The principle of deference to licensee judgments, unless the licensee has simply departed from the underlying assumptions of good faith and reasonable discretion, is an integral part of the fairness doctrine, and a fixture that has been reiterated and applied with fidelity by the courts.").

[98] *Georgia Power Project v. FCC*, 559 F.2d 237, 240 (5th Cir. 1977).

[99] *Polish Am. Cong. v. FCC*, 520 F.2d 1248, 1256 (7th Cir. 1975).

[100] *Green v. FCC*, 447 F.2d 323, 327 (D.C. Cir. 1971).

[101] *Galloway*, 778 F.2d at 19.

[102] *Straus*, 530 F.2d at 1108.

portance," [103] and "[m]erely because a story is newsworthy does not mean that it contains a controversial issue of public importance." [104] Indeed, the fact that a "claim relates to a matter of public concern … is not the same thing as arguing a position on a controversial issue of public importance." [105] The standard's narrowness was a significant reason why "[t]he Commission [found] prima facie evidence of a [fairness doctrine] violation … in relatively few cases." [106]

Fairness doctrine complaints routinely were dismissed because the material broadcast did not arise in the context of a controversial issue of public importance. Such dismissals occurred frequently, for a variety of reasons, [107] including that the issue in question was not controversial, the controversy was no longer current and/or already had been resolved on one side of the issue or the other, [108] or was of concern not to the public generally or a substantial portion of it, but rather only a narrow subset or even specific individuals. [109] Dismissals also occurred because the

---

[103] *Polish Am. Cong.*, 520 F.2d at 1254-56. *See also Galloway*, 778 F.2d at 19.

[104] *Healey v. FCC*, 460 F.2d 917, 922 (D.C. Cir. 1972). *See Polish Am. Congress*, 520 F.2d at 1255; *NBC v. FCC*, 516 F.2d at 1114 ("there is a substantial difference between what is newsworthy, *i.e.*, that which is interesting to the public, and what is controversial").

[105] *Neckritz v. FCC*, 502 F.2d 411, 414 (D.C. Cir. 1974).

[106] *American Sec. Council*, 607 F.2d at 447.

[107] All that was required was for an issue either to fail the "controversiality" requirement, or to be of insufficient "public importance." *See Galloway*, 778 F.2d at 19 ("Commission determines separately whether an issue is controversial and whether it is of public importance").

[108] *E.g.*, *Complaint of Accuracy in Media*, 94 F.C.C.2d 501 (1983); *Mr. Friedrich P. Berg*, 71 F.C.C.2d 387 (1978); *Complaint by Leading Families of America, Inc*, 31 F.C.C.2d 594, 595 (Broad. Bur. 1971); *Complaint by George R. Walker*, 26 F.C.C.2d 238 (1970). *See also Polish Am. Congress*, 520 F.2d at 1256 (citing absence of "contrary" positions and "disagreement" over issue, or any other "public controversy [that] existed at the time of the broadcast").

[109] *E.g.*, *Complaint of Minnesota Farmers Union*, 88 F.C.C.2d 1455 (1982); *Application by Nat'l Ass'n of Gov't Employees*, 41 F.C.C.2d at 967; *Complaint by NFL Players Ass'n*, 39 F.C.C.2d 429 (1973). *See also Healey*, 460 F.2d at 922-23 ("petitioner may be newsworthy … but [she and her activities do not] qualify as a controversial issue of public importance");

purported "controversial issue of public importance" either was defined too narrowly, [110] or not narrowly enough. [111] The narrow, limited scope of qualifying issues applies in the Section 317 context, as the Commission has recognized. [112]

2. FCC Experience With the Fairness Doctrine Confirms that a Broad Sponsorship ID Rule for News Would Fail

If the FCC tried to define which stories that used VNR material required disclosure and which did not, the Commission would quickly be engulfed in a legal morass. Separating news stories that include "controversial issues of public importance" from other news items would not be a simple matter, and would subject all newscasts that potentially contain VNR material to governmental scrutiny. This is particularly a risk now that the Commission has issued an open invitation for the public to file complaints on this issue, [113] or, in effect, to act as a "Neighborhood Watch program" for Section 317 violations. [114] In this regard, the Commission seeks to enlist "engaged citizens" to "act as watchdogs for the FCC" with respect to product placements

---

Galloway, 778 F.2d at 19 ("The principal test of public importance … is … a selective evaluation of the impact the issue is likely to have on the community at large.").

[110] *E.g.*, *John T. Harrison*, 57 F.C.C.2d 612 (1975).

[111] *E.g.*, *Complaint of the Conservative Caucus, Inc.*, 94 F.C.C.2d 728, (1983) ("national defense" is not a controversial issue of public importance because it involves "extensive and diverse" subissues). *See also American Sec. Council*, 607 F.2d at 448.

[112] *Barry Silverman*, 63 F.C.C.2d at 512 (citing 47 U.S.C. §§ 317(a)(1) & (2)).

[113] *See e.g.*, Remarks of Commissioner Jonathan S. Adelstein before The Media Institute, May 25, 2005 ("Adelstein Media Institute Remarks.").

[114] *Commissioner Adelstein Applauds New FCC Fact Sheet on Payola Rules*, News Release, June 15, 2005 ("We are enlisting everyone who watches and listens to the media in the effort to catch violations of our payola rules … [l]ike a Neighborhood Watch program ….") *See also* www.fcc.gov/cgb/consumerfacts/PayolaRules.html.

and VNRs, or with regard to any news segment that, to them, "looks like an advertisement," and has promised investigations of any "serious problems" that are raised. [115]

Extending Section 317 obligations to news programs in this way would create a situation comparable to the five-year period between 1969 and 1974 in which the FCC attempted to apply the fairness doctrine to some product commercials and not others. It was forced to abandon the effort as an utter failure. The same thing would happen here, and the effort would insert the government deeply into the editorial process. This period began when the FCC experimented with interpreting the fairness doctrine to require counter-advertising for cigarette product advertising. [116] It reasoned that advertising promoting smoking presented one side of a controversial issue of public importance and that counter-advertising was needed to provide a balanced presentation of views. In upholding this policy, the D.C. Circuit found the obligation to run counter-advertising arose "not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include … a responsibility" to inform listeners of the other side. [117]

At the time of the tobacco ruling, the Commission expressly rejected as a "parade of horribles" the claim that "if governmental and private reports on the possible hazard of a product are a sufficient basis" for requiring counter-advertising, "the ruling would apply to a host of other products, such as: automobiles, food with high cholesterol count, alcoholic beverages,

---

[115] Adelstein Media Institute Remarks, *supra* note 113.

[116] *WCBS-TV*, 8 F.C.C.2d 381, *stay and recon. denied*, 9 F.C.C.2d 921 (1967).

[117] *Banzhaf v. FCC*, 405 F.2d 1082, 1093 (1968), *cert. denied*, 396 U.S. 842 (1969). The central premise of the counter-advertising requirement was that cigarettes are a "unique" product. The FCC noted that governmental and private reports, as well as congressional action indicated that "normal use of this product can be a hazard to the health of millions of persons." *WCBS-TV*, 9 F.C.C.2d at 943.

fluoride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles, and even common table salt." [118] But despite the FCC's confidence about its ability to draw the line with cigarettes, it was quickly overrun with demands for counter-advertising in a wide variety of situations. Demands for time arose from retail store advertising during a labor dispute, [119] automobile advertisements, [120] gasoline advertising, [121] institutional advertising praising commercial television, [122] advertisements advocating oil exploration, [123] institutional advertisements for a power company, [124] army recruiting advertisements, [125] advertisements for snowmobiles, [126] and even advertisements for dog food. [127]

While the FCC rejected some demands for counter-advertising (army recruiting, gasoline additives, snowmobiles, etc.), it accepted others (oil exploration, utility rates, retail advertising). Even in cases where the FCC did not mandate responsive ads, the Court of Appeals did. Thus, in *Friends of the Earth v. FCC*, the D.C. Circuit reversed the denial of a complaint regarding advertisements for high-powered cars. The court rejected the FCC's claim that cigarettes are a

---

[118] *WCBS-TV*, 9 F.C.C.2d at 942-943.

[119] *Retail Store Employee's Union, Local 880 Retail Clerks International Ass'n, AFL-CIO v. FCC*, 436 F.2d 248 (D.C. Cir. 1970).

[120] *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971).

[121] *Neckritz v. FCC*, 502 F.2d 411.

[122] *Anthony R. Martin-Trigona*, 19 F.C.C.2d 620, 622 (1969).

[123] *Wilderness Soc'y and Friends of the Earth*, 30 F.C.C.2d 643 (1971).

[124] *Media Access Project*, 44 F.C.C.2d 755 (1973).

[125] *Green v. FCC*, 447 F.2d 323.

[126] *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975).

[127] *Complaint by Mrs. Fran Lee*, 37 F.C.C.2d 647 (1972).

"unique" product and was "unable to see how the Commission can plausibly differentiate the case presently before us from *Banzhaf*." [128]

The Commission's problem in fashioning a coherent "public interest" response to issues arising from product advertising resulted in a thorough examination of the issues. At the conclusion of this extensive fact-finding, the FCC concluded that it had been a "great mistake" to impose counter-advertising requirements and it expressly declined to do so in the future. [129] In particular, the FCC found that the policy had become "particularly troublesome" because it could not be limited to cigarette advertising as originally promised. [130] The D.C. Circuit agreed that the agency had "great difficulties" in fashioning a coherent policy regarding counter-advertisements and found that "if anything, [the FCC] understated the problem." [131] The same difficulty would overwhelm any attempt to regulate sponsorship announcements in newscasts that use parts of VNRs that touch on "controversial issues."

3. FCC Oversight in this Area Would Have a Significant Chilling Effect

Requiring news organizations to consider the potential regulatory ramifications whenever they use material from a VNR would have a significant chilling effect on the dissemination of news. As a threshold matter, "[n]othing in [the Communications Act of 1934] was intended to permit the exercise by the FCC of control over editorial decisions of broadcast journalists." [132] A

---

[128] *Friends of the Earth v. FCC*, 449 F.2d at 1170.

[129] *Fairness Report*, 48 F.C.C.2d at 26.

[130] *Id*. at 25.

[131] *National Citizens Comm. for Broad.*, 567 F.2d 1095, 1100 (D.C. Cir. 1977).

[132] *New Jersey State Lottery Comm'n v. United States*, 491 F.2d 219, 222 (3d Cir.), *cert. granted*, 417 U.S. 907 (1974), *vacated and remanded for consideration of mootness*, 420 U.S. 371 (1975) (per curiam), *on remand*, 519 F.2d 1398 (3d Cir.) (table). *See also* 420 U.S. at 374

news broadcast "is more than a passive receptacle or conduit for news, comment, and advertising." [133] The "choice of material to go into" the news, "and the decisions made as to limitations as to the [scope] and content," of what is reported, "constitute the exercise of editorial control and judgment. It has yet to be determined how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press." [134] Even if one assumes the government may mandate disclosure when broadcasters are paid to broadcast information, in the absence of such payment there are virtually no grounds for the government to administer a complaint process that examines what goes into a station's "regular news broadcasts." [135]

The construction of Section 317 set forth in the Public Notice ignores these precepts. If the use of material from VNRs is subject to sponsorship identification requirements, the Commission would be empowered to oversee the decisions of broadcast journalists with respect to the sources they use in news coverage. This would leave licensees in constant fear of failing to account for every scrap of footage and each soundbite that they do not independently produce. It would have chilling effects much like those associated with the fairness doctrine, which the Commission ultimately eliminated. These include "fear of denial of license renewal" for Section 317 violations due to improper or unwitting use of VNRs, "costs of defending" against claims of

---

(Douglas, J., dissenting) ("It is … shocking that a radio station … can be regulated by a court or by a commission, to the extent of being prevented from publishing any item of 'news' of the day. So to hold would be a prior restraint of a simple and unadulterated form, barred by constitutional principles.").

[133] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

[134] *Id.*

[135] *Id. Cf. AFL-CIO v. FCC*, 11 F.3d at 1433-34 (limits on equal time requirements that evolved out of, then were codified as corollary to, the fairness doctrine, were designed to counter "fear" that "such a rule would render ordinary news coverage impossible").

improper VNR usage, and "reputational harm resulting from even a frivolous" charge.[136] Such problems would lead stations to forego coverage of news that has not been independently gathered, reported, edited and produced instead of using VNRs or similar third-party sources.

Such a result cannot be reconciled with the First Amendment. It is well settled that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental action that falls short of a direct prohibition against the exercise of First Amendment rights."[137] Broadcasters forced to consider possible government regulation of the news "out of reasonable caution or even an excess of caution, may censor their own expression well beyond what the law may constitutionally demand. That is what a 'chilling effect' means."[138]

C. Applying Sponsorship ID Requirements to the Use of VNRs in Newscasts Would Violate the First Amendment

Establishment of new sponsorship identification requirements for VNRs, effectuated through a newly expansive reading of Section 317, would face insurmountable First Amendment pitfalls. Since the FCC first adopted the fairness doctrine and related rules, the law has evolved substantially, including recognition that to "regulate in the area of programming the FCC must find its authority in provisions other than" general grants of power, even with respect to broadcasters that traditionally enjoyed reduced First Amendment protection.[139] This is a significant

---

[136] *Syracuse Peace Council*, 867 F.2d at 660-661.

[137] *Reporters Comm. for Freedom of the Press v. AT&T*, 593 F.2d 1030, 1052 (D.C. Cir. 1978). *See also Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996) (same).

[138] *Nike, Inc. v. Kasky*, 539 U.S. 654, 683 (2003) (Breyer, J., dissenting). *See Planned Parenthood v. Casey*, 947 F.2d 682, 712 (3d Cir. 1991) ("the principal power of Damocles' sword is in its hanging rather than its fall"). *Cf. Hunger in America*, 20 F.C.C.2d at 150 (citing potential "concern that our inquiries into allegations of deliberate distortion of new or staging of purported incidents … may … inhibit licensee's freedom or willingness to present programming dealing with the difficult issues facing our society").

[139] *See, e.g., MPAA v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002).

development, as it is now well-settled the fairness doctrine lacks a statutory basis, but rather is authorized only by the public interest standard. [140] To the extent "[g]reat caution is warranted" where FCC "regulations rest on no apparent statutory foundation," any extension of the rules here must have a sound basis in specific grants of authority in the Act. [141]

The above developments aside, the rationale for regulating broadcast content, whatever its past validity, can no longer be sustained. The FCC eliminated the fairness doctrine in 1987 due to First Amendment implications of the rule, and that decision was upheld by the courts in *Syracuse Peace Council* and *RTNDA*. When the doctrine was upheld against First Amendment challenge almost four decades ago, it was based on "'the present state of commercially acceptable technology' as of 1969." [142] Since then, the Commission joined the swelling ranks of courts and commentators that have questioned the continuing validity of the scarcity rationale as articulated in *Red Lion*. [143]

---

[140] *TRAC*, 801 F.2d at 517. *See also id*. at 516 ("The Commission premised its decision on the fact that Congress never actually codified the fairness doctrine.").

[141] *See, e.g.*, *American Library Ass'n v. FCC*, 406 F.3d 689, 702 (D.C. Cir. 2005).

[142] *News America Publ'g, Inc. v. FCC*, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969)).

[143] *Syracuse Peace Council*, 2 FCC Rcd at 5052-54; *id*. at 5068 n.201 ("fact that government may license broadcasters to use frequencies in order to minimize interference, and thus to maximize the effective dissemination of speech through the electromagnetic spectrum, does not justify content regulation"). *See Meredith Corp.*, 809 F.2d at 867 ("the Court reemphasized that the rationale of *Red Lion* is not immutable"); *TRAC v. FCC*, 801 F.2d at 507-08 (citing "deficiencies of the scarcity rationale," including those identified by the FCC itself); *Loveday*, 707 F.2d at 1458-59 (questioning continuing validity of scarcity rationale and noting that "it seems unlikely that the First Amendment protections of broadcast political speech will contract further, and they may well expand"). *See also Banzhaf*, 405 F.2d at 1100 ("some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets"). *But see Prometheus Radio v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, __ U.S. ___, 2005 WL 521213 (June 13, 2005) (relating to structural regulations, not content controls).

A very recent staff analysis released by the Commission reiterates the conclusion that spectrum scarcity is a thing of the past and cannot be used to justify restrictions on news judgment.[144] The abstract of the Analysis puts it bluntly:

> [T]he Scarcity Rationale for regulating traditional broadcasting is no longer valid. The Scarcity Rationale is based on fundamental misunderstandings of physics and economics, efficient resource allocation, recent field measurements, and technology. It is outmoded in today's media marketplace.[145]

The Staff Analysis "takes up where the Commission's 1987 [*Syracuse Peace Council*] decision left off" and, among other things, expounds on the observations regarding the explosion of the availability of diverse sources of information and viewpoints available to the public and the means for media outlets – and individuals – to communicate.[146] It concludes that the "Scarcity Rationale, based on the scarcity of channels, has been severely undermined by plentiful channels," including a wide variety of new spectrum uses and other platforms that open practically innumerable opportunities to reach the viewing and listening public.[147] Although this analysis does not bind the Commission, it suggests that the FCC would have much to explain if it sought to expand governmental supervision over newscasts.

---

[144] *See* FCC Staff Analysis, John W. Berresford, *The Scarcity Rationale For Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (March 2005) ("*Scarcity Rationale Staff Analysis*").

[145] *Id*. at ii.

[146] *Id*. at 8, 11-18. *Compare Syracuse Peace Council*, 2 FCC Rcd at 5051, 5052-53.

[147] *Scarcity Rationale Staff Analysis* at 11.

IV. THE COMMISSION LACKS AUTHORITY TO EXTEND SPONSORSHIP IDENTIFICATION RULES TO CABLE TELEVISION NETWORKS

Section 317 does not apply to cable television programming, contrary to suggestions in the Public Notice.[148] It is notable that Congress amended Section 315 provisions relating to political broadcasting in 1971 to apply to cable systems (but not cable networks),[149] and has never similarly amended Section 317. Instead, the extension of Section 317 to cable television is a purely administrative interpretation by the FCC and without any direction from Congress to do so. This fact was explicitly acknowledged when the Commission first extended the sponsorship identification rules to cable solely on policy grounds.[150] Though it noted "some challenge to our jurisdiction … under the Communications Act and the first amendment" to extend the rules in this fashion, it brushed these concerns aside.[151] However, intervening changes in the Act and in the jurisprudence of content regulation make clear that any effort to apply Section 317 to cable television would be invalid.

One of the most significant intervening changes was Congress's enactment of the Cable Acts of 1984 and 1992. In both cases, though Congress was aware of the FCC's 1969 decision to apply the sponsorship ID rules to cable television it did not incorporate into the Act statutory authority for such FCC action. It made no such conforming change in the law despite the fact

---

[148] Public Notice at 6 (Section 317 sponsorship identification requirements "also apply to origination programming by cable operators"). The requirements of Section 508 apply only to broadcast, as the FCC recognizes. *See id*. at 6 n.6 (Section 508 "applies only to broadcasters").

[149] *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

[150] *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, 20 F.C.C.2d 201, 220 (1969) ("We think that [public interest concerns] necessitate CATV compliance with the legislative policy reflected in section 317 of the Communications Act[.]").

[151] *Id*. at 219-20.

that it had amended the Section 315 political broadcasting rules in 1971 to encompass origination cablecasting. At the same time, the 1984 Cable Act added Section 624(f)(1), which states that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the … content of cable services, *except as expressly provided in this subchapter*." [152] Consequently, the fact that Section 317 includes no mention of cable whatsoever means that the FCC lacks the authority to regulate sponsorship IDs on cable programs. [153]

If the Commission had Section 317 jurisdiction over cable, as it asserts, even it concedes that the statute would reach only "origination programming" and not cable networks. [154] This much is apparent from the text of the rules, which state that sponsorship ID rules for cable operators apply only to "origination cablecasting," defined as "programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the … operator." [155] This limitation also is clear from the original extension of the sponsorship ID requirements to cable. [156] Thus, even if the FCC properly could exert

---

[152] 47 U.S.C. § 544(f)(1) (emphasis added).

[153] *American Library Ass'n*, 406 F.3d at 700-05; *MPAA v. FCC*, 309 F.3d at 802-06. Under the maxim *expressio unius est exclusio alterius*, when a statute provides authority for an action, and is silent as to a similar, related action, the law must be interpreted as authorizing only the former and not the latter. *E.g.*, *Nextwave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 152-153 (D.C. Cir.), *aff'd*, 537 U.S. 293 (2003). *See also Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978); *Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991).

[154] Public Notice at n. 6 (sponsorship ID requirements "apply to *origination programming* by cable operators) (citing *Amendment of the Commission's Sponsorship Identification Rules*, 52 F.C.C.2d 701, 712 (1975)) (emphasis added).

[155] 47 C.F.R. §§ 76.1615, 76.5(p).

[156] *See Amendment of Part 74*, 20 F.C.C.2d at 219 ("Despite some challenge to our jurisdiction to impose any requirements on CATV *origination*, there was general unanimity in

Section 317 jurisdiction over cable television, the rules would not apply to programming networks such as CNN, MSNBC, or FOX News, but would extend only to programming originated by cable operators.

Finally, there is a substantial constitutional impediment to applying Section 317 to cable programming. The FCC has never had the constitutional authority to regulate cable and satellite content in the same way as broadcasting. In *Turner Broadcasting System v. FCC*, after noting the Commission's "minimal" authority over broadcast content, the Supreme Court held that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation." 512 U.S. 622, 637 (1994). Noting the "fundamental technological differences between broadcast and cable transmission," the Court found that application of "the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation." *Id*. *See also United States v. Playboy Entmt. Group, Inc.*, 529 U.S. 803, 815 (2000) (citing "key difference" between cable and broadcasting in striking down indecency regulations imposed on cable operators); *Time Warner Entmt. Co., L.P. v. FCC*, 56 F.3d 151, 181 (D.C. Cir. 1995).

CONCLUSION

The Commission should not conflate questions involving government speech with its legislative limitations on "propaganda" and questions of news judgment that are beyond the FCC's appropriate jurisdiction. To do so would represent an unprecedented expansion of the

---

the comments that, if *origination* is to be permitted, it would be desirable in the public interest for CATV … to identify sponsors, [as] comments on behalf of CATV interests indicated that they would have no objection to conducting their *origination* in this manner, and … [w]e think there is no real question but that CATV *origination* … should comport with these cardinal policies[.]") (emphases added).

Commission's authority to review editorial decisions. The resulting complaint process would have the unintended consequence of subjecting day-to-day news judgments to governmental oversight, which would have a significant chilling effect and would inevitably raise constitutional questions. Moreover, both statutory and constitutional limitations preclude extending such rules to cable television networks. Accordingly, the Commission must make clear that its interpretation of Sections 317 and 508 in the Public Notice do not extend sponsorship identification requirements to the use of VNRs in newscasts.

Respectfully submitted,

PR Newswire Association LLC
MultiVu, Inc.
810 Seventh Avenue, 35th Floor
New York, New York 10019

By /s/ Ken Dowell
Ken Dowell
Executive Vice President, Information Services
(212) 596-1500

Robert Corn-Revere
Davis Wright Tremaine L.L.P.
1500 K Street, N.W., Suite 450
Washington, D.C. 20005-1272
(202) 508-6600
Counsel

June 22, 2005